No. 00-133

In The

Supreme Court of the United States

JAMES BENNETT, in his official capacity as Secretary of State of Alabama, et al.,

Appellants,

v.

PEGGY KELLEY, et al.,

Appellees.

On Appeal From The United States District Court For The Middle District Of Alabama

BRIEF OF JAMES BENNETT AND THE STATE OF ALABAMA IN OPPOSITION TO MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO AFFIRM

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TABLE OF AUTHORITIES

Page

CASES

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 5

Chandler v. Harris, 120 S. Ct. 1716 (2000), *summarily aff'g Fouts v. Harris*, 88 F. Supp. 2d 1351 (S.D. Fla. 1999) 3

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 7

Liner v. Jefco, Inc., 375 U.S. 301 (1964) 6

Lopez v. Monterrey County, 519 U.S. 9 (1996) 4

Maxwell v. Foster, Civil Action No. 93-1378 (W.D. La. Nov. 24, 1999) 5

Miller v. Johnson, 515 U.S. 900 (1995) 4

Reno v. Bossier Parish School Board, 120 S. Ct. 866 (2000) 7

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 7

Shaw v. Reno, 509 U.S. 630 (1993) 4

Shuford v. Alabama State Board of Education, 920 F. Supp. 1233 (M.D. Ala. 1996) 4

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 8

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 10

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 9

United States v. Hays, 515 U.S. 737 (1995) 1, 2, 3, 4

Vermont Agency of National Resources v. United States, 120 S. Ct. 1858 (2000) 8

TABLE OF AUTHORITIES – Continued

Page

STATUTES

13 U.S.C. § 141(c) (1994) 1

Ala. Code § 17-16-11(a)(1) (1995) 4

REGULATIONS

28 C.F.R. § 51.54(a) (1999) 7

BRIEF IN OPPOSITION

This case presents important questions of federal law that are likely to recur in the next round of redistricting litigation. It involves *Shaw*-based challenges to the districting plan for the Alabama Legislature and raises questions of standing, laches, mootness, the absence of meaningful relief, and sufficiency. The next redistricting cycle will begin in January 2001, when the Census Bureau begins to distribute the results of the 2000 Census to the States. Alabama should have its results no later than April 1, 2001. *See* 13 U.S.C. § 141(c) (1994). The Alabama Legislature will then have the opportunity to redraw its district lines, and the population changes over the past decade make it highly unlikely that any of the districts, much less those the District Court has declared unconstitutional, will continue to look like they do now. Nonetheless, the District Court told the Alabama Legislature not to use the same lines for seven districts in the new plan.

In the litigation that is almost certain to follow the States' next attempts to reapportion and redistrict, the parties and the courts will confront the issues presented by this appeal.[1] More particularly, they will have to determine:

- Whether a mere allegation of residence in a district is sufficient to establish standing or whether, as this Court held in *United States v. Hays*, 515 U.S. 737, 739 (1995), the allegation of residence is sufficient only when the plaintiff shows that the district in which he or she resides is the "primary focus" of the claim;

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[1] While this case involves a State legislature, the Court's guidance will be of equal assistance to the multitude of State, county, municipal, and other governmental bodies that elect their members from single-member districts.

- Whether, after a certain point in each decade, prudential bars such as laches, mootness, and the inability to offer meaningful relief can be invoked to defer adjudication of *Shaw* claims until after a State redistricts to reflect the results of a new Census; and
- Under what circumstances a court may disregard the race-neutral explanations of district lines offered by incumbent legislators.

This case offers the Court the opportunity to provide clear, timely guidance to the parties and the courts that will be involved in the litigation to follow. Accordingly, this Court should deny the Kelley Plaintiffs' "Motion to Dismiss, or in the Alternative to Affirm," and note probable jurisdiction.

1. The District Court misread the elements of standing under *United States v. Hays*. Contrary to the Kelley Plaintiffs' contention, Motion at 9, the District Court did not "adopt[ ] a straightforward reading of *Hays*. . . . " Rather, the District Court acknowledged that its approach "admittedly conflates Article III jurisdiction with the merits, a situation not often encountered." App. at 5a. The fact that such conflation is "a situation not often encountered," *id.*, shows that the District Court's approach is not "a straightforward reading of *Hays*." Instead, the District Court abandoned the "primary focus" inquiry mandated by *Hays* after reading the complaint and allowed the Kelley Plaintiffs to attack districts in which they do not reside.

The Reed-Buskey Plan included a number of new or redesigned black-majority districts which adjoin the districts in which the Kelley Plaintiffs live. As the dissenting judge explains:

> The creation of these majority-black districts necessarily caused the neighboring districts to change shape, admittedly substantially at times, and resulting in rather irregular boundaries. Nonetheless, the only sense in which the plaintiffs object to the way their own districts were

> drawn is insofar as their districts represent the negative space out of which the objectionable majority-black districts were carved.

App. at 63a (Thompson, J., dissenting). The majority opinion displays the dissent's reasoning in several places:

- SD 25/HD 63 in the Tuscaloosa area "felt the repercussions of Dr. Reed's strategy. . . . " App. at 28a;
- "[W]ithout excising black Tuscaloosa area population from SD 21 to give it its squashed-butterfly shape, Dr. Reed could not have created the new SD 24." App. at 32a;
- The shape of SD 30 is explained by the need to preserve Lowndes County's black population for two majority-black Senate districts, SD 23 and 24. App. at 37a;
- "Being on HD 85's periphery puts HDs 86 and 89 within the zone of the effects of HD 85." App. at 41a; and
- HD 86 was affected by HD 85. App. at 42a.

As these citations show, the District Court adjudicated "ripple effect" claims, the primary focus of which was *not* the districts in which the Kelley Plaintiffs reside, but, rather, adjoining black-majority districts in which they do not reside.

This Court precluded such ripple effect claims in *Hays*, when it declared that reliance on the demographics of neighboring districts does not establish standing to bring a *Shaw* claim. *See* 515 U.S. at 746. The District Court failed to give any meaning to this portion of *Hays*. Accordingly, this Court should review the District Court's treatment of *Hays*.

2. The Kelley Plaintiffs' contention that laches does not bar their claims is incorrect. At the outset, Bennett and the State note that laches applies to redistricting claims. *See, e.g., Chandler v. Harris*, 120 S. Ct. 1716 (2000), *summarily aff'g Fouts v. Harris*, 88 F. Supp. 2d 1351 (S.D. Fla. 1999) (three-judge court) (dismissing *Shaw*

claims on ground of laches). The Kelley Plaintiffs' reliance on *Shuford v. Alabama State Board of Education*, 920 F. Supp. 1233, 1239 (M.D. Ala. 1996), Motion at 21, is misplaced because *Shuford* was a Section 5 case, and the passage of time is no bar to § 5 actions. *See Lopez v. Monterrey County*, 519 U.S. 9, 22-23 (1996). Entirely different considerations apply to *Shaw* claims.

Laches applies to the Kelley Plaintiffs' claims because they have never explained what took them until August 29, 1997, to move to intervene in the Rices' lawsuit. All of the law they needed to make their claim was in place by the end of June 1995. By that time, this Court had rendered decisions that: (1) established a cause of action for racial gerrymandering, *Shaw v. Reno*, 509 U.S. 630 (1993); (2) established the elements of standing, *Hays* (1995); and (3) established the elements of proof for *Shaw* claims, *Miller v. Johnson*, 515 U.S. 900 (1995). Had the Kelley Plaintiffs filed in 1995, the Alabama Legislature would have had the sessions of 1996 and 1997 to devise a remedy in time for the 1998 election cycle. Instead, by the time the Kelley Plaintiffs moved to intervene, the 1997 session was over, and a special session would have been necessary to avoid disrupting the 1998 cycle. Orderly administration of that cycle called for candidates to file their qualifying paperwork in early April 1998. *See* Ala. Code § 17-16-11(a)(1) (1995). Thus, by their unexplained delay, the Kelley Plaintiffs effectively (and, perhaps, intentionally) took the Alabama Legislature out of the picture.

The Kelley Plaintiffs' suggestions that the State and Bennett were responsible for the delay thereafter, and that there has been no prejudice, lack merit. As for the delay, which the Kelley Plaintiffs attribute to Bennett's and the State's defense of the plan, Motion at 19, a vigorous defense was justified. The State Defendants note that they prevailed entirely on two of the three original claims and, in whole or in part, as to several plaintiffs on

their *Shaw* claims. *See* Bennett J.S. at 6. As for prejudice, the District Court has inserted itself unnecessarily into the next round of the State's redistricting and has directed that the State pay attorneys' fees. None of that is necessary now.

Indeed, as the three-judge court observed in *Maxwell v. Foster*, Civil Action No. 93-1378, slip op. at 9 (W.D. La. Nov. 24, 1999) (three-judge court), laches is not a "permanent barrier" to claims.[2] Rather, it simply defers judicial consideration of them until a time when relief can effectively be ordered. The District Court should have deferred its consideration of the Kelley Plaintiffs' claims until the Alabama Legislature drew a new plan using the results of the 2000 Census or failed to reapportion itself.

3. The Kelley Plaintiffs fail to show why they should not be bound by the Alabama Supreme Court's holding that similar *Shaw*-based claims against other districts in the same plan were moot.[3] In their Jurisdictional Statement, Bennett and the State showed that the Alabama Supreme Court dismissed the appeals of John and Camilla Rice because those appeals were moot. *See* Bennett J.S. at 22-24; App. at 197a-200a. The Rices did not petition this Court for certiorari, so that holding was final before the District Court heard the claims of the Kelley Plaintiffs. The District Court rejected the contention that the Alabama Supreme Court's holding of mootness should be applied to the Kelley Plaintiffs' claims, reasoning that the Alabama Supreme Court had not been asked

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[2] A copy of the Order Granting Defendants' Motion for Summary Judgment in *Maxwell* has been lodged with the Clerk of the Court.

[3] Bennett and the State suggest that, because this case is moot, the Court should vacate the judgment of the District Court and remand the case with instructions to dismiss. *See Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

to consider a special election as a remedy and had applied state law. *See* App. at 11a-12a.

The Kelley Plaintiffs' reliance on the District Court's report that different remedies were at issue is misplaced because that report is clearly erroneous. In the Alabama Supreme Court, Bennett and the State contended, *inter alia*, that "the trial court's judgment should be vacated and this case dismissed as moot." App. at 345a (capitalization altered). In their Reply Brief, John and Camilla Rice argued, *inter alia*, that

> at any time between now and the time when the results for the next decennial census are made available to the state for redistricting purposes, *a special election may be required in any House or Senate district*. As unfortunate as it is to discuss, the death of a legislator requires that a special election be held in the district represented by that deceased legislator.

App. at 359a-360a (emphasis added).[4] Thus, the Alabama Supreme Court had before it the contention that a special election could be required, but held the claims moot nonetheless.

In so doing, the Alabama Supreme Court did not apply Alabama law, as the Kelley Plaintiffs now suggest. Rather, the Alabama Supreme Court noted that *this Court* had recognized "several exceptions to the *federal* doctrine of mootness," but the Alabama court found them inapplicable. App. at 199a-200a n.1 (emphasis added). If the Rices wanted to challenge this reasoning, they should have petitioned for certiorari. In *Liner v. Jefco, Inc.*, 375 U.S. 301, 304 (1964), this Court reviewed and set aside an intermediate state court's holding of mootness, but did so on direct, certiorari review. *Liner* is not an exception to

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[4] Pursuant to an Order from the District Court, the Kelley Plaintiffs filed both of these Briefs and other Alabama Supreme Court pleadings with the District Court.

the *Rooker-Feldman* doctrine,[5] as the Kelley Plaintiffs suggest.

The District Court, however, second-guessed the Alabama Supreme Court's ruling on mootness. As noted, its factual predicate for doing so is clearly erroneous. Separate and apart from that factual error, the District Court should have respected the *Rooker-Feldman* doctrine and applied the Alabama Supreme Court's conclusion of mootness to the Kelley Plaintiffs. In every material respect, the Kelley Plaintiffs were indistinguishable from John and Camilla Rice: They all wanted to challenge districts that the State used for the final time in 1998.

The Kelley Plaintiffs' reliance on *Reno v. Bossier Parish School Board*, 120 S. Ct. 866 (2000), to avoid mootness is misplaced.[6] That case involved claims under Section 5 of the Voting Rights Act, not *Shaw* claims. As noted above, Section 5 claims are fundamentally different. Moreover, the Kelley Plaintiffs' attempt to use collateral consequences as a trump threatens to open the door to more end-of-decade redistricting litigation that conflicts with the State's expectations of quiet before the storm of post-Census litigation. Finally, as white residents of white-majority districts in a white-majority state, the Kelley Plaintiffs lack standing to raise retrogression. *See* 28 C.F.R. § 51.54(a) (1999).

4. The Kelley Plaintiffs do not show that the District Court granted meaningful relief. In this case, the District Court declared that no further elections could be conducted in seven districts as currently drawn, but did not direct that those districts be redrawn or that a special election be conducted. *See* App. at 51a-52a. The dissenting judge correctly criticized this relief as "curious," *id.* at

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[5] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[6] The Kelley Plaintiffs said nothing about retrogression until post-trial oral argument on January 25, 2000.

71a, "empty," *id.* at 72a, and "non-substantive," *id.* at 74a. (Thompson, J., dissenting). As he explained, the majority's decision not to order special elections meant that "[o]ne day, one month, and even one year, after the court enters its final order today [*i.e.*, April 24, 2000], the status quo will remain; nothing will have changed." App. at 73a (Thompson, J., dissenting).

The emptiness of the relief granted shows that an essential element of justiciability is missing. In *Vermont Agency of Natural Resources v. United States*, this Court reiterated that "redressability" is an element of standing. 120 S. Ct. 1858, 1861-62 (2000). It defined "redressability" as "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976)). The relief granted in this case does not meet that standard for two reasons. First, as the dissenting judge observes, the plaintiffs receive no tangible, immediate benefit from the District Court's ruling. *See* App. at 71a (Thompson, J., dissenting) ("[I]f these districts are really racially gerrymandered the injury is ongoing and persists as long as the districts remain in place. . . . "). Second, any delayed gratification will not result from the District Court's ruling, but, rather, from the State's preexisting constitutional obligation to redistrict.

The Kelley Plaintiffs' characterization of the State's and Bennett's argument as inconsistent is misguided. Whenever a federal court tells a State agency or official to do something, it acts intrusively. If, as here, the District Court has imposed "no substantive relief at all," App. at 70a (Thompson, J., dissenting), it has acted intrusively without any justification for having done so.

5. The Kelley Plaintiffs' pessimism about the Alabama Legislature's ability to adopt a redistricting plan next year does not justify the exercise of hypothetical jurisdiction. Bennett and the State disagree with a fundamental premise of the Kelley Plaintiffs' argument. They

point to the Alabama Legislature's history of being unable to devise redistricting plans and contend that the District Court had to intervene now because the post-2000 redistricting will be no different. The Kelley Plaintiffs' conclusion does not follow from their premise. If the Legislature cannot devise a new plan for the 2002 elections, the old plan cannot be used because it will violate constitutional one-person-one-vote principles. For example, the incumbent in HD 75 testified that the population of his district has grown dramatically since 1990. Maintaining HD 75's current shape for the next Legislative elections would violate one-person-one-vote standards. Any such election could be enjoined, and litigation seeking such an injunction would be filed as soon as it became clear that no plan would be forthcoming from the Legislature. Until that happens, Bennett and the State believe the courts must assume that the Legislature will perform its constitutionally mandated duty. To predicate relief on a pessimistic belief that the Legislature will fail is speculative. *See* App. at 70a (Thompson, J., dissenting).

In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998), this Court observed, "Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." One way or another, the present district lines are unlikely to be used again after 2001; either the Legislature will change them to reflect the Census results, or the courts will enjoin an election and devise a remedy. The pessimism reflected in the Kelley Plaintiffs' brief has driven the District Court to return an advisory opinion.

6. This Court should review the District Court's conclusions regarding sufficiency of the evidence to ensure that the Kelley Plaintiffs met their heavy burden of proof. In particular, the District Court improperly disregarded race-neutral explanations of district lines offered by Senator Wendell Mitchell, the incumbent in SD

30, and Representatives Phil Poole and Bryant Melton, who represent districts in the Tuscaloosa area, two of which (SD 25 and HD 63) were declared unconstitutional. The District Court should have considered whether the Kelley Plaintiffs had carried their burden to show those explanations to be pretextual before rejecting them. *Cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ("[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason [is] false, and that discrimination [is] the real reason."). The Kelley Plaintiffs did not carry that burden.

CONCLUSION

For the reasons stated in the Jurisdictional Statement of Bennett and the State and this Brief in Opposition, this Court should deny the "Motion to Dismiss, or in the Alternative to Affirm," and note probable jurisdiction or, in the alternative, summarily reverse the District Court's judgment.

Respectfully submitted,

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